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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1235

ROBERT McKINLEY HOUSTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ROBERT McKINLEY HOUSTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Robert McKinley Houston, petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. F) is unreported. The opinion of the District Court, also unreported, appears at (App. E).

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1975. Jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

WHERE A WARRANTLESS ARREST AND SEARCH IS UNDERTAKEN BY FEDERAL AGENTS BASED UPON INFORMATION OBTAINED FROM AN UNNAMED AND UNIDENTIFIED INFORMANT, MUST THE GOVERNMENT SHOW BY COMPETENT EVIDENCE THAT SUCH INFORMANT HAD DIRECT AND PRESENT KNOWLEDGE OF A VIOLATION OF LAW ON THE PART OF THE PERSON ARRESTED?

II

WHERE A FEDERAL AGENT, BASED UPON FACTS KNOWN TO HIM AND INFORMATION REPORTED TO HIM BY AN INFORMANT, IS WITHOUT PROBABLE CAUSE TO MAKE AN ARREST, WOULD AN ARREST, BY ANOTHER AGENT IN ANOTHER STATE, UPON THE FORMERS REQUEST BE WITHOUT PROBABLE CAUSE?

III

WHERE THE GOVERNMENT SEEKS TO JUSTIFY A WARRANTLESS ARREST AND SEARCH ON THE BASIS OF INFORMATION ALLEGEDLY SUPPLIED BY AN INFORMANT, MAY IT RELY ON HEARSAY IN THE FOURTH DEGREE TO ESTABLISH THE RELIABILITY OF THE INFORMANT AND THE CREDIBILITY OF THE INFORMATION SUPPLIED BY THE INFORMANT?

STATEMENT OF THE CASE

On February 19, 1974, near the hour of 10:00 a.m. at Cox Municipal Airport, north of the City of Dayton, Ohio, Petitioner, Robert McKinley Houston was arrested and subjected to a search by agents of the Federal Government. Neither arrest nor search was authorized by warrant. As a result of the search a quantity of narcotics was recovered from petitioner which, over objections, was introduced at his trial, resulting in his conviction for possession of heroin and cocaine for sale, § 21 U.S.C. 841 (a) (1).

The foregoing chain of events was set in motion on the evening preceding the arrest and was the result of a series of transactions involving an investigation by a New York Agent of the United States Drug Enforcement Agency (D.E.A.) and some mysterious late night activities of a person, whose identity remains unknown, who allegedly acted as an informant for the New York Agent. The Government's contention that by reason of the events and happenings of that evening there existed probable cause at the time of petitioners arrest to believe he was violating the drug laws requires evaluation of the evidence given to that end.

At the hearing on petitioner's motion to suppress the evidence seized from him we learned that three officers of the D.E.A. operating in two states are involved and that the main thrust of the government's case rests upon certain information, reported by an informant, who operated in the City of New York.

The New York Transactions:

An informant operating in New York allegedly tipped one Agent Coonce that a quantity of narcotics had been

sold to an unknown individual in a New York bar by a person known as Wallace. The informant supplied a description of the purchaser and indicated that such person would be departing New York to Ohio by air on the morning of February 19. Nowhere in the record will be found any testimony by any person with personal knowledge thereof as to what manner or by what means such information was obtained by the informant. Coonce, upon receipt of this information took up surveillance at the airport (during what time is not established) and upon locating the identified individual, ascertained that he was departing New York via T.W.A. flight 129 to Dayton, Ohio. Coonce then contacted Agent Lough, (time not established) and related what he learned from his informant and observed at the airport. Either Coonce or Lough (not clear from the record) had prior dealings with the informant (extent thereof not disclosed) and knew that he had an informant's number and had submitted reliable information in the past (extent thereof not established).

No arrest was made in New York because Coonce was not sure of his authority to do so.

The Cincinnati, Ohio Transactions:

It is now the morning of February 19, and between the hours of 7:30 and 8:00 a.m. Special Agent Augustine Genitz, while at his home is summoned to his telephone. Upon answering he is advised by his caller that he is talking to Agent Lough of the New York Office of D.E.A. Lough then related to Ginetz what he had learned from Coonce. Ginetz knew neither Coonce nor Lough but was familiar with their names from records in the agency.

At the conclusion of this call Ginetz contacted agents McCoy and Powell of his office and arranged to travel with

McCoy to Dayton and to meet Powell there. He then contacted his office and instructed his secretary to contact the Dayton police department, alert them to the arrival of the suspect and arrange for assistance in making the arrest.

Ginetz and McCoy set out for Dayton, as did Powell in a separate automobile. Because of their race with the clock (it must now be 8:00 a.m. or better and flight 129 was expected at 9:45) the officers immediately embarked on their 60 mile drive without taking time to obtain either arrest or search warrants (indeed if they could with the information at hand.)

The Dayton, Ohio Transactions:

Ginetz, McCoy and Powell arrived at the airport ahead of flight 129 and took up positions to enable them to cover the arrival of their suspect. They were joined by Detective Burlong, Dayton Police Department who noticed and pointed out to the agents one Charles Goff who was known to him and known by name to Ginetz (whether Goff be informant or offender is not disclosed). In time they observed their subject deplaning T.W.A. flight 129, the description from New York was accurate. The subject approached Goff (after a momentary stop in the men's room) and the two went to the parking lot. The officers closed in, guns in hand, identified themselves, placed the two men under arrest and conducted the search which resulted in the discovery of heroin and cocaine.

REASONS FOR GRANTING THE WRIT

Petitioner has contended from the beginning that the agents and officers who arrested him without warrant were without authority to do so and that the arrest, search and statements taken incident thereto were in violation of his rights secured to him by the Fifth and Fourth Amendments, U.S. Constitution, and should have been excluded from his trial.

Because of the substantial degree of hearsay involved in the pre-arrest transactions, petitioner contends that this case is distinguishable from *Draper* v. *United States,* 358 U.S. 307 (1959), and should have been determined under the Fourth Amendment rules set forth in *Aguilar* v. *Texas,* 378 U.S. 108 (1964); and *Spinelli* v. *United States,* 393 U.S. 410 (1969). See also *United States* v. *Harris,* 403 U.S. 573 (1971).

The government has contended that the case is controlled by *Draper,* supra.

At the hearing on petitioner's motion to suppress, the New York agents did not testify and the Government's case for probable cause was sustained only on the hearsay testimony of the Ohio agents who had no personal knowledge of the informant and who were not privy to the report made by the informant.

ARGUMENT

I

WHERE A WARRANTLESS ARREST AND SEARCH IS UNDERTAKEN BY FEDERAL AGENTS BASED UPON INFORMATION OBTAINED FROM AN UNNAMED AND UNIDENTIFIED INFORMANT, MUST THE GOVERNMENT SHOW BY COMPETENT EVIDENCE THAT SUCH INFORMANT HAD DIRECT AND PRESENT KNOWLEDGE OF A VIOLATION OF LAW ON THE PART OF THE PERSON ARRESTED?

The arresting officers justify the warrantless arrest and search at Cox Municipal Airport upon the alleged existence, at that time, of probable cause to believe that petitioner was then and there violating the United States Drug Laws. Such probable cause, it is claimed, is reasonably assumed to be present in the minds of such officers because of the reports received by them from New York.

As was said in *Draper* v. *United States,* supra:

> "Probable cause exists where "the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that "an offense has been or is being committed. *Carrol* v. *United States,* 267 U.S. 132, 162. . . ." 358 U.S. 307, 314

The part of the formula to be found lacking here is the absence of "reasonably trustworthy information". It is unquestioned that the officers at the moment of arrest had no "personal knowledge" of an offense in the act of commission.

It is conceded that probable cause may be constructed almost entirely, if not entirely, of hearsay information. *United States* v. *Harris,* 403 U.S. 573, 581 (1971). The relevant question is whether or not the hearsay is credible and affords a reasonable basis for the officer's belief in the existence of the offense at the moment of the arrest. On this record, Coonce received information that petitioner (then an unknown but accurately described person) had purchased narcotics. The basis of the information as to kind, character, whether direct observation, speculation, etc., is not disclosed. Coonce passed this information to Lough without causing an arrest to be made. Lough passed it on to the Ohio agents and based thereon the arrest was made.

The facts here are similar to those in *Beck* v. *Ohio,* 379 U.S. 89 (1964), where the arresting officer's testimony drew the following comment:

> . . . the arresting officer who testified said that no more than someone (he did not say who) had told him something (he did not say what) about the petitioner. *Beck* v. *Ohio,* 370 U.S. 89, 97.

In the instant proceedings, the arresting officer knew not what was said to Coonce or by whom. Coonce did not appear to testify as to the credibility of his informant, but worse, no one appeared to testify as to what was actually said by the informant. All we have is the conclusionary statement, fourth hand, that petitioner bought narcotics from one Wallace. Did the informer see this, hear this, participate in the transaction, pick the information up at the corner bar? No one can say for there was no testimony to inform the court on these matters.

Harris, Aguilar and *Spinelli* are all search warrant cases, and the inquiry was focused upon whether or not the mag-

istrate had presented to him sufficient facts upon which an independent judgment of probable cause could be made. The inquiry here is guided by the same standards. *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964).

In *United States* v. *Harris,* 403 U.S. 573 (1971), a warrant issued upon probable cause was based to a substantial extent on the receipt of an informant's tip. The warrant was finally approved by this Court after rejection below, but it must be observed that the affidavit of the arresting officer disclosed that the informant had personally observed the suspects illegal acts. 403 U.S. 573, 581.

The warrant was disapproved in *Aguilar* v. *Texas,* 378 U.S. 108, 113 (1964), where it was observed:

> The affidavit here not only contains no affirmative allegations that the affiant spoke with personal knowledge of the matters contained therein it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge". For all that appears, the source here merely suspected, belived or concluded that there were narcotics in petitioner's possession.

See also note (4) 378 U.S. 108, 114.

Again, a warrant based upon an affidavit failing to set forth personal observation of the subject's violation of law was struck down in *Spinelli* v. *United States,* 393 U.S. 410, 416 (1969).

In the instant proceedings Ginetz executed his arrest based upon the informant's report coming to him through the Coonce-Lough conduit even though there was an absence of an assertion that the affiant knew, as opposed to concluded, that petitioner was violating the narcotics laws. Agent Coonce did not appear at the suppression hear-

ing to cure this defect, if in fact he could. In any event, Ginetz was without any direct knowledge, his own or the informer's, that petitioner was in the act of violation of any law.

The uncertainty of the entire transaction is further emphasized by the fact that the officers in New York, being in possession of the same information relied upon by the Ohio officers, did not affect an arrest, but allowed the suspect to fly off on T.W.A. flight 129, thus risking two hours in which the evidence, if in fact they believed in it, could have been lost forever.

II

WHERE A FEDERAL AGENT, BASED UPON FACTS KNOWN TO HIM AND INFORMATION REPORTED TO HIM BY AN INFORMANT, IS WITHOUT PROBABLE CAUSE TO MAKE AN ARREST, WOULD AN ARREST, BY ANOTHER AGENT IN ANOTHER STATE, UPON THE FORMERS REQUEST BE WITHOUT PROBABLE CAUSE?

Testimony given at the suppression hearing established that the arrival of petitioner as expected by the officers happened and further that petitioner met the description earlier transmitted to the officers. Hence there was concurrence in time and place in conformance with the informant's tip *and* the separate intelligence gained by Coonce at the airport in New York. Here again we depart from *Draper, supra,* for there, the placing of the identified suspect was from the informant's lips unaided by investigation. The corroborative feature in *Draper, supra,*

being that the suspect was where the *informant* said he would be. Here, petitioner was found to be where *another agent* said he would be, hence, as to the officers in Dayton, this fact adds nothing to the trustworthiness of the informant's tip.

Further, the record in this case will show that the agents only briefly had petitioner under observation, did not even know his name until he was arrested, and independently corroborated only lawful acts of petitioner — see e.g., *Spinelli* v. *United States,* 393 U.S. 410, 418 (1969).

As already recounted, the alleged tip from the government's informer is devoid of any personal observation of a violation of any law by petitioner, and therefore is far short of the "reasonably trustworthy information" required by the concept of probable cause, *Draper, supra,* and does not raise to meet the "substantial basis" test of *Harris, supra.* The arresting officers, and the New York officers observed no illegal conduct of petitioner. Hence there was no probable cause in New York to arrest petitioner. Would this not explain the fact that no arrest was attempted in New York?

Assuming the foregoing to be true, what effect would Lough's call have on Ginetz in terms of probable cause. If in fact the former requested the latter to make the arrest would then a good faith execution on the request justify the arrest?

This question has been answered adverse to the government in *Whitley* v. *Warden,* 401 U.S. 560, 568 (1971).

Petitioner would urge that a showing of direct knowledge of the suspect's criminal activity on the part of the informer and the communication of such fact prior to the arrest is particularly applicable in this action where the communicating officers having the full knowledge of the alleged information have not themselves effected an arrest

but instead requested their brother officers in another state to do so. See e.g., (n) 4 *Aguilar* v. *Texas, supra,* 378 U.S. 108, 114.

> . . . A police officer who arrived at the "suspicion", "belief" or "mere conclusion" that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he "received reliable information from a credible person" that narcotics were in someones possession.

III

WHERE THE GOVERNMENT SEEKS TO JUSTIFY A WARRANTLESS ARREST AND SEARCH ON THE BASIS OF INFORMATION ALLEGEDLY SUPPLIED BY AN INFORMANT, MAY IT RELY ON HEARSAY IN THE FOURTH DEGREE TO ESTABLISH THE RELIABILITY OF THE INFORMANT AND THE CREDIBILITY OF THE INFORMATION SUPPLIED BY THE INFORMANT?

Petitioner concedes, for purpose of pre-trial motions in proceedings where guilt or innocence are not at stake that the government relying upon information from an informant need not reveal his identity. *McCray* v. *Illinois,* 386 U.S. 300 (1967). The sound reasons for this proposition are set forth at pages 386 U.S. 305-315. A reading of the case and the reasons given for the informer's privilege, however, establishes no basis for the departure from the rules of hearsay respecting a Federal Agent's evidence respecting his knowledge of the informant in terms of credibility, his information from the informant in terms of its trustworthiness and probativeness, and his conclusions, given all he knows, or has been told of whether or not probable cause to arrest is present.

The circuitous route of the informant's revelations in the instant case from mouth to ear and state to state presents quite another problem of proof of probable cause. The alleged information was transmitted to New York Agent Coonce by some informer, identity unknown. Coonce, it is said, corroborated the information and then reported to New York Agent Lough who in turn reported to Agent Ginetz in Ohio who was required to drive 60 miles to an airport to make an arrest (Cincinnati to Cox Municipal Airport north of Dayton, Ohio).

No satisfactory answer has ever been given on this record why the original recipient of the informant's intelligence, being Coonce, who is alleged to have corroborated independently such information did not, based thereon, make the arrest.

Instead, while having petitioner under observation, he phoned a brother agent in New York who in turn phoned the Ohio agents who hurriedly drove the 60 miles required, according to their testimony, in a mad rush with the clock to make the arrest on the very identical information allegedly transmitted to them from New York.

Why?

Our mystery was not resolved at the hearing to suppress the evidence for the prime recipient of the informant's information, Coonce, did not testify, nor did his brother agent New York officer Lough. Instead, Ohio Agent Ginetz took the stand and dutifully reported his fourth degree hearsay information over objection. And this strained and stretched line of knowledge was accepted as the basis of probable cause for the arrest which took place in the early morning of February 19, 1974.

In *Draper, McCray,* and *Harris* the officers had direct knowledge of the person of their informant and were directly privy to his intelligence and professed a belief that given their own knowledge of independent factors surrounding the arrest, coupled with the information personally received from their informant, they had probable cause to arrest or search.

No such testimony is in this record. Here Ginetz, at best, relies upon the conclusions of his brother officer many miles away at the time of arrest, and petitioner at his suppression hearing was powerless to question either that knowledge or the state of mind of Coonce on the morning of February 19, 1974. All petitioner could do in this regard is ask the question, which he did, if probable cause to arrest was present in Coonce's judgment at that time, why was he not arrested in New York?

Coonce was not present at the suppression hearing and as a result what he knew and what he was told remains a mystery and the facts thereby withheld from the inquiry at the suppression hearing are fatal to any lawful conclusion that petitioner was then and there in the act of committing any crime and that probable cause at that time and place existed upon which the arrest and concurrent search of petitioner could be based.

CONCLUSION

This singular case presents a unique record to the attention of this Honorable Court and asks important questions of national policy in the application of the commandments of the Fourth Amendment to the Constitution of the United States.

1. Does an arrest without warrant based upon an informant's revelations to a federal agent require a showing of personal knowledge on the part of such informant of the present violation of a crime? If so:

2. Can the existence of such knowledge be established through the hear-say testimony of another federal agent who knew not the informant or who had not received the informant's tip and therefore could not testify of personal knowledge as to the substance of what was said by such informant?

Because of such uniqueness and for the reasons set forth in the analogous authorities hereinbefore set out, your petitioner respectfully submits that the instant proceedings warrant review by this Honorable Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unresonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX B

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21 U.S.C. 841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

28 U.S.C. 1254

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. Cr. 3-74-25

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT McKINLEY HOUSTON,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed November 5, 1974)

This cause now comes on to be considered pursuant to the motion of defendant to have the Court suppress all evidence seized as the result of a warrantless arrest and subsequent search (also warrantless) of defendant by federal narcotics agents which took place on or about February 19, 1974. The material sought to be suppressed for use as evidence consists of certain quantities of heroin and cocaine, as well as certain inculpatory statements defendant allegedly made to the federal agents after his arrest. It is alleged by the defendant that the manner in which this evidence was procured from him by the government violated his rights under the Fourth and Fifth Amendments to the Federal Constitution. If this is indeed the case, it is by now axiomatic that such evidence could not be used in a criminal proceeding against defendant,

Weeks v. U.S., 232 U.S. 383 (1914), see also, Mapp v. Ohio, 367 U.S. 643 (1961).

The pertinent facts of this case were adduced at a hearing held before this Court on September 17, 1974 at ten o'clock A.M.

In the early morning hours of February 19, 1974, special agent Coonce of the New York Office of the Drug Enforcement Administration [DEA] was in contact with special agent Lough of that same New York office. Coonce told Lough that based upon his (Coonce's) personal obesrvations as well as certain data that he had obtained from a reliable informant that a Negro male, approximately thirty years of age, 6 feet 2 inches tall, with a moderate "Afro" hairstyle and mustache, wearing a white checkered suit, a black turtle-neck sweater, a black three-quarter length fur coat and carrying a small attache case would arrive at Cox Municipal Airport in Vandalia, Ohio aboard TWA Flight 129. This flight was to arrive in Vandalia from New York at 9:45 A.M. It was reported that the above-described individual would possess illegal narcotic drugs. The informant mentioned above had told New York Agent Coonce of the appearance and whereabouts of the above-described person. The evidence shows that the New York Agents had found this informant, although he [or she] is not identified, to have been reliable in past instances. DEA Agent Coonce had also personally observed defendant at the airport in New York; however, Coonce made no arrest at the New York Airport because he was alone at the time and felt uncertain of his authority to do so. All of this information was relayed from agent Lough in New York by telephone to Special DEA Agent Ginetz in Cincinnati between 7:30 and 8:00 A.M. on February 19, 1974. Agent Ginetz immediately contacted Agents Powell and McCoy by telephone and advised that the three of

them were to proceed forthwith to the airport in Vandalia, Ohio. Powell and McCoy were also in Cincinnati at that time. Agent Ginetz also had his secretary immediately make a telephone call to Dayton, Ohio and have detective Burlong of the Dayton Police Department meet the federal agents at the Vandalia airport. Burlong actually did so. The three federal agents and Dayton police detective Burlong arrived at the Vandalia airport at approximately 9:30 A.M. It is undisputed that at no time did the DEA agents here involved attempt to procure an arrest or a search warrant. The stated reason was that, "There wasn't time." It is also undisputed that it is some sixty (60) miles from where the agents were in Cincinnati, at the time of receipt of the call from New York, and the Vandalia airport, a distance these agents had to cover by automobile in some one and a half hours in order to make this arrest. Agent Ginetz took the call from the New York agent at his home in Cincinnati, which is about one half hour's "drive" from the federal courthouse building in Cincinnati. Upon receiving this call, Ginetz testified that he relied upon it in part because he was familiar with the names Lough and Coonce since he was aware that agents by those names worked out of the New York DEA office.

Shortly after agents Powell, McCoy and Ginetz arrived at the Vandalia airport an individual matching the above description was observed deplaning by agent Powell. The agents observed defendant for a brief period of time in order to make sure that he was the only person at the airport matching the detailed description received from the New York office. Defendant was then arrested as he started to enter an automobile with another person. Upon being advised that he was under arrest the defendant dropped the small attache case he was holding. The attache case

was retrieved by the arresting officers, opened, and found to contain illegal narcotic drugs. The evidence adduced at the oral hearing held herein showed that defendant was advised of his constitutional rights once immediately after being arrested, again while en route from the airport to the Dayton Police Department, and that he was given a "Standard Rights Form" directly upon arrival at the Dayton Police Station. The defendant, after all of these warnings, then told the DEA agents that he had made the alleged purchase of heroin and cocaine in New York and had brought these drugs to Ohio. Upon this state of facts any contention made by defendant that any rights secured to him by the ruling in Miranda v. Arizona, 384 U.S. 436 (1966), were violated is totally without merit.

Defendant alleges that the arrest and subsequent search of him at the airport are both illegal since both actions were taken without warrants. But a legal search and seizure can be made as properly incident to a warrantless arrest if the arrest itself is shown to have been lawful, Chimel v. California, 395 U.S. 752 (1969). The Supreme Court has recently dramatically reaffirmed this principle in U.S. v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973). The crucial question thus left to determine in this case is whether the warrantless arrest of defendant was itself lawful.

A warrantless arrest is lawful if all the facts and circumstances clearly show that the arresting officer has "probable cause" to believe that a felony was being committed by the arrestee, Ker v. California, 374 U.S. 23 (1963), Johnson v. U.S., 333 U.S. 10 (1948), *see also*, Aguilar v. Texas, 378 U.S. 108 (1964), Spinelli v. U.S., 393 U.S. 410 (1969), Carroll v. U.S., 267 U.S. 132 (1925), U.S. v. Pearce, 275 F.2d 318 (7th Cir. 1960). What constitutes "probable cause" is to be determined according to

what a reasonable and prudent man, rather than a legal technician, might do under the facts and circumstances of a particular case, Brinegar v. U.S., 338 U.S. 160, 175 (1948).

The thrust of this defendant's argument is that the informer ultimately responsible for the government's action in this case was utilized in a manner which did not measure up to the standards set forth with regard to the use of informers in the case of McCray v. Illinois, 386 U.S. 300 (1967) and with regard to the use of "unspecified information and reports" about persons in Beck v. Ohio, 379 U.S., 89 (1964). The *Beck* and *McCray* cases, however, are not precisely in point with regard to the factual situation now presented to the Court. More instructive for present purposes is the case of Draper v. U.S., 358 U.S. 307 (1959), where the facts were remarkably similar to those of the present case except that the defendant there got off a train instead of, as here, an airplane. The *Draper* case also made it quite clear that officers may properly consider "hearsay" in trying to decide whether they have probable cause to make an arrest. An informant's tip which considered alone might not support a finding of probable cause can rise to that level if corroborated by other observations and investigations of the arresting officers, U.S. v. Anderson, 500 F.2d 1311, 1317 (5th Cir. 1974), see also, U.S. v. Burch, 471 F.2d 1314 (6th Cir. 1973). Indeed it has been held that the reliability of an informant need not be established where the supplied information has been corroborated in detail, U.S. v. Manning, 448 F.2d 992 (2nd Cir. 19), Cert den., 404 U.S. 995 (1971). In the recent case of U.S. v. Ho Yee Bon, 378 F. Supp. 582 (S.D.N.Y. 1974) probable cause was found to exist for a warrantless arrest by DEA agents at a railroad station based on a "tip" from an anonymous

telephone caller where the agents were able by independent observation and investigation to corroborate in detail the information given over the telephone. This is similar to what happened in the present case, except that the basis for probable cause here was much stronger than in *Ho Yee Bon* for several reasons. The informer here was not exactly anonymous. He was known, at least, to the New York agents who called the Cincinnati agents. The Cincinnati agents acted not only upon hearsay about what the informer knew but also in part based their actions upon the observations of Agent Coonce in New York. All persons, times, places, and descriptions in this case evolved as the New York caller said they would. The dress of defendant matched his given description almost to the letter and the DEA agents were particularly careful to ascertain that he was the only individual so dressed in the airport at the time. Under the total facts and circumstances of this case what the Cincinnati agents were told by telephone by the New York agents was sufficiently corroborated by their own actions to give them probable cause to make this arrest. The arrest being lawful, so was the search and seizure incident thereto. It is also noted that the short time in which these agents had to drive from Cincinnati to Vandalia to make an apprehension gave rise to exigent circumstances having further effect in bringing the actions of these agents within the reasonableness standards mandated by the Fourth Amendment.

Wherefore, after careful consideration, it is the judgment of this Court that the motion of defendant to suppress the evidence herein should be and the same hereby is OVERRULED.

It is so ORDERED.

/s/ CARL A. WEINMAN
Judge, U. S. District Court

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. CR. 3-74-25

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT McKINLEY HOUSTON,
Defendant.

ORDER

(Filed December 10, 1974)

This cause now comes on for consideration of defendant's motion to have the Court reconsider its overruling of defendant's motion to suppress pursuant to its order of November 5, 1974.

The Court has carefully considered the cases cited in defendant's latest brief and the arguments deduced therefrom. It is, of course, always possible for counsel to attempt to stretch a nondeterminative piece of dicta in a particular written decision to make it seem as if the facts of his case are governed thereby. Nonetheless, the reasoning and the precise holdings of the cases cited by the defendant simply do not support his arguments when applied to the facts of this case. These facts were thoroughly considered in this Court's order of November 5, 1974. There is no reason to repeat them here. It should suffice to say that the precise issue here was whether the officers had probable cause to make a warrantless arrest under these circumstances. Mere use of an informer by the agents need not necessarily bring into play the two-pronged test of reliability and underlying circumstances set out in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. U.S., 393 U.S. 410 (1969). If other factors than informer's tips induced the agents to act, as was the present case, these factors may also be considered in establishing probable cause and thereby give the government a broader basis for the justification of its actions. The test is essentially one of common sense and reason. Matters that might make an affidavit for a warrant insufficient when considered in isolation need not necessarily vitiate the presence of probable cause to make a warrantless arrest in a much broader and more involved set of circumstances, U.S. v. Canieso, 470 F.2d 1224 at 1229 (2d Cir. 1972), U.S. v. Manning, 448 F.2d 992 (2d Cir. 1971) (*en banc*), *see also,* Jones v. U. S., 362 U.S. 257 (1960), U.S. v. Burch, 471 F.2d 1314 (6th Cir. 1973).

Wherefore, it is the judgment of the Court that defendant's motion to reconsider should be and the same hereby is OVERRULED.

It is so ORDERED.

JUDGE, U. S. DISTRICT COURT
/s/ CARL A. WEINMAN

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. Cr. 3-74-25

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT McKINLEY HOUSTON,
Defendant.

ORDER

(Filed February 14, 1975)

This cause came on to be tried before the Court without a jury at ten o'clock A. M. on February 12, 1975.

Defendant herein was charged by information with two separate counts of violating 21 U.S.C. 841 (a) (1). Jury trial was waived in this case pursuant to the terms of F.R.Cr. P. 23 (a). Taving heard and thoroughly considered all of the evidence, this Court now finds that defendant, as so charged, is guilty beyond any reasonable doubt of Count I and of Count II of the information as filed. *See,* F.R.Cr. P. 23 (c).

The Court also here reaffirms its Order of November 5, 1974 overruling defendant's motion to suppress in this case and also its Order of December 10, 1974 on

reconsideration of that matter. The Court further believes and holds that there is no legal or factual basis for assertion of the defense of entrapment in this case.

A presentence report will now be expeditiously prepared and this matter will proceed to sentencing.

It is so ORDERED.

/s/ CARL A. WEINMAN
JUDGE, U. S. DISTRICT COURT

APPENDIX F

No. 75-1675

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT McKINLEY HOUSTON,
Defendant-Appellant.

ORDER

(Filed December 24, 1975)

Before: EDWARDS and MILLER, Circuit Judges, and CHURCHILL,* District Judge.

*The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

The defendant was charged and found guilty of possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. Sec. 841 (a) (1). The trial was to the court without a jury.

On appeal, defendant Houston contends that the district court erred in overruling his motion to suppress certain items of evidence on the ground that the evidence was obtained as the result of an unlawful search and seizure.

It appears that narcotics agents in New York received substantially the following information: That a negro male, approximately 30 years of age and six feet two inches in height, with a moderate "Afro" hairstyle and mustache, wearing a white checkered suit, a black turtleneck sweater, and a black three-quarter length fur coat, carrying a small attache case, would arrive at the Cox Airport terminal, Vandalia, Ohio, about 9:45 A.M., March 19, 1974, on a flight from New York. The information further was that the person so described would be carrying in the attache case a quantity of narcotics. Much of this information so conveyed by the informer was corroborated by the personal observations of one of the New York agents in the New York airport where the described person boarded a plane for the Vandalia Airport in Ohio. The agent did not make an arrest at that time for the reason that he was not certain of his authority to do so. This information was conveyed by the New York agents to agents in Ohio, who arranged to be present at the time of the arrival of the plane at the Vandalia Airport. The Ohio agents observed that a person answering the description of the person described by the New York agents arrived on the flight indicated, and that he was carrying an attache case. The Ohio agents did not make an immediate arrest, but waited for a short length of time to determine that no other person departed the plane, or was present in

the airport, answering the same description as the person they were looking for. When the agents observed the suspected individual about to enter an automobile, they arrested defendant without a warrant, seized the attache case, and, after searching it, found that it contained a quantity of drugs later determined to be heroin and cocaine. On the basis of the evidence seized by the Ohio agents, the defendant was subsequently indicted and later tried with the result indicated above.

We have carefully considered the defendant's contention on appeal, challenging the validity of his arrest and the accompanying search and seizure of the drugs, and we are of the opinion that the defendant's contention is without merit.

The information communicated to the Ohio agents by the agents in New York was obtained by the New York agents from a reliable informer, and the essential facts were corroborated by one of the New York agents in the New York airport. In addition, the facts conveyed by the New York agents were carefully verified by the agents in Ohio and were found to be correct in substantially every detail.

Under these circumstances, we find that the arrest and search and seizure were valid. *See Draper* v. *United States*, 358 U.S. 307 (1959); and *United States* v. *Thacker*, 382 F.2d 732 (6th Cir. 1967).

AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
MAY 5 1976
MICHAEL RODAK, JR., CLERK

No. 75-1235

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT MCKINLEY HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1235

ROBERT MCKINLEY HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that probable cause for his arrest and the subsequent search of his briefcase was not sufficiently established.

After a jury-waived trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of possessing controlled substances (heroin and cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive nine-year prison terms. The court of appeals affirmed (Pet. App. F 11a-13a).

The evidence showed that on the evening of February 18, 1974, Drug Enforcement Administration (D.E.A.) agent John Coonce, stationed in New York, received detailed information concerning a drug transaction from an informant who had previously provided reliable information to the authorities (Tr. 19).[1] The informant

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[1] "Tr." refers to the transcript of the suppression hearing held on September 17, 1974.

indicated that an individual from the Dayton, Ohio, area had purchased a quantity of drugs from a known person at the Paradise Bar in New York. The purchaser was described as a thirty-year-old black male, about six feet two inches in height, who was wearing a black and white checked suit, a black turtle neck sweater, and a three-quarter length black fur coat. The informant further indicated that the purchaser would be boarding a plane early that morning to return to Ohio (Tr. 10, 20).

Accordingly, Coonce went to the airport and observed a person meeting the above description board TWA flight 129 to Dayton. Coonce relayed this information to D.E.A. agent Lough, also in New York, and Lough hurriedly called D.E.A. agent Augustine Ginetz, who was stationed in Cincinnati (Tr. 16, 8-9). Ginetz and two other agents then went to the Dayton airport and, after flight 129 had landed, observed petitioner, matching the description given to Coonce, alight from the plane carrying an attache case (Tr. 9, 10). Petitioner met another person and as the two left the airport, the agents arrested them and discovered quantities of heroin and cocaine in petitioner's briefcase.

Petitioner first argues (Pet. 7-12) that the facts do not establish that the informant possessed direct knowledge of the events that he described to Coonce. While there was no indication as to how the informant learned of petitioner's activities, the detailed description of petitioner and his movements—corroborated by Coonce and the arresting agents—fully established the reliability of his information. Such particularized detail constitutes an alternative to the general requirement that the specific source of an informant's knowledge be proven. See *Spinelli* v. *United States*, 393 U.S. 410, 416.

Since Coonce's information and subsequent observation at the airport constituted probable cause for petitioner's arrest, no impropriety attached to the fact that Ginetz, rather than Coonce, actually made the arrest, based upon the information relayed to him.[2] Contrary to petitioner's view of *Whiteley* v. *Warden*, 401 U.S. 560, that case affirms that once probable cause is established, the subsequent arrest may be effectuated by others, in reliance upon the initial investigators' findings. *Id.* at 568.

Petitioner further contends (Pet. 12-14) that because agent Coonce was not called at the suppression hearing to substantiate Ginetz's testimony detailing what he had learned from the New York agent, the proof of probable cause was insufficient. This contention is incorrect. Probable cause may be established by hearsay. *United States* v. *Harris*, 403 U.S. 573, 580; *United States* v. *Matlock*, 415 U.S. 164, 172-177. In any event, petitioner could have subpoenaed Coonce if he had wished to dispute the accuracy of Ginetz's testimony.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[2]That an arrest warrant was not obtained for petitioner's arrest does not nullify the propriety of the arrest. *United States* v. *Watson*, No. 74-538, decided January 26, 1976.